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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, PETITIONER

v.

GENERAL RAILWAY SIGNAL COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit was obliged to conform its decision in this case to a later decision of the District of Columbia Court of Appeals, called to the federal court's attention in a petition for rehearing, that expressly rejected the construction of District of Columbia law that the federal court applied in this case.

2. Whether a contract clause that provides for an "equitable adjustment" but does not mention prejudgment interest provides the kind of express waiver of sovereign immunity that *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), requires in order for prejudgment interest to be awarded.

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GENERAL RAILWAY SIGNAL COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Washington Metropolitan Area Transit Authority respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 875 F.2d 320. The original opinion of the court of appeals, before rehearing (App., *infra*, 21a-37a), is unreported. The opinions of the district court (App., *infra*, 38a-44a and 45a-50a) are reported at 625 F. Supp. 22 and 598 F. Supp. 595.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 51a-52a) was entered on May 12, 1989. A petition for rehearing was denied on September 11, 1989 (App., *infra*, 53a-54a), and the order denying rehearing was amended on September 26, 1989 (App., *infra*, 57a-58a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The issue in this case is whether respondent General Railway Signal Company (GRS) is entitled to prejudgment interest on a monetary award made by the district court under an "equitable adjustment" clause in a contract between the Washington Metropolitan Area Transit Authority (WMATA) and GRS. Applying District of Columbia law, the United States Court of Appeals for the District of Columbia Circuit upheld the award of prejudgment interest. The court held that the mere use of the phrase "equitable adjustment" constituted an agreement to pay prejudgment interest and was sufficient to waive WMATA's sovereign immunity.

The D.C. Circuit's decision is flatly contrary to a later decision of the highest court of the District of Columbia, which expressly rejected the decision below and held (even without regard to sovereign immunity principles) that an "equitable adjustment" clause of the same vintage as the one at issue here does not permit an award of prejudgment interest. That decision was called to the attention of the court below in a petition for rehearing, but the court denied rehearing without explanation.

Furthermore, the decision of the court below is contrary to *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), which holds that prejudgment interest is not allowable against an entity with sovereign immunity in the absence of an express waiver of that immunity. There is no such express waiver in this case, and the D.C. Circuit made no effort to reconcile its analysis with *Shaw*.

A. Factual and Procedural Background

In June 1971, WMATA invited bids for furnishing and installing a train control system for initial phases of WMATA's rapid transit project. GRS was the successful bidder. Its bid included a line item of $1,336,500 for "trenching" work (excavating trenches alongside the train track for burial of cable and refilling the trenches). The parties executed a contract in September 1971 for a total of $42,074,675.30. App., *infra*, 2a-3a; C.A. App. 1-3.[1]

Before the trenching work began, WMATA decided not to use underground trenches, triggering the following contract clause:

> If any change * * * causes an increase or decrease in the Contractor's cost of * * * the performance of any part of the work under this contract * * * an equitable adjustment shall be made and the contract modified in writing accordingly.

C.A. App. 47; see App., *infra*, 3a. WMATA maintained that the appropriate change would be to decrease the contract price by the $1.3 million GRS

[1] "C.A. App." refers to the Record Excerpts in the D.C. Circuit.

had listed as the line item for trenching. GRS demanded a much smaller downward adjustment, and the matter became subject to the dispute resolution process provided by the contract. App., *infra*, 3a-4a. That process consists of submitting the matter to the Board of Contract Appeals of the Army Corps of Engineers, whose decision is subject to review by the WMATA Board of Directors or its delegate. There is a limited right of judicial review of the decision of the Board of Directors or its delegate. C.A. App. 48-49.

The Board of Contract Appeals agreed with WMATA's position requiring a reduction of more than $1.3 million. C.A. App. 1-19; *General Railway Signal Co.*, 84-1 B.C.A. (CCH) ¶ 17,014; see App., *infra*, 4a. On April 17, 1984, the General Manager of WMATA, as delegate of the Board of Directors, approved and adopted the Board's advisory opinion. C.A. App. 20; see App., *infra*, 5a. The district court, however, held that the line item for trenching was not a reasonable cost estimate and remanded the case to the Board to determine a reasonable cost estimate. App., *infra*, 45a-50a.

The Board on remand determined that a reasonable cost estimate was $360,548. C.A. App. 28-38; *General Railway Signal Co.*, 85-2 B.C.A. (CCH) ¶ 18,014; see App., *infra*, 5a-6a. The Board took no position on whether interest on that award was allowable. C.A. App. 37; 85-2 B.C.A. at 90,349; see App., *infra*, 6a. The General Manager of WMATA rejected the Board's opinion on remand and adhered to her earlier decision requiring a reduction of more than $1.3 million. C.A. App. 39; see App., *infra*, 6a.

The district court again set aside the administrative decision, holding that GRS was entitled to $975,952, the difference between the amount that WMATA had withheld and the amount that the Board found was a reasonable cost estimate, $360,548. App., *infra*, 38a-44a. The court awarded prejudgment interest on that amount on the ground that, despite WMATA's sovereign immunity, "[w]aiver occurred here by virtue of the 'equitable adjustment' language" in the contract clause quoted above. *Id.* at 41a-42a. The court ordered that prejudgment interest be calculated from April 17, 1984, the date of the General Manager's initial decision, at the 6% rate prescribed by D.C. Code § 28-3302(a) (Supp. 1989). App., *infra*, 42a-43a. The court also awarded postjudgment interest at the rate prescribed by D.C. Code § 28-3302(c) (Supp. 1989). App., *infra*, 43a.

B. Proceedings in the D.C. Circuit

Both parties appealed. WMATA argued that the district court erred on the merits and that any award of prejudgment interest was improper. GRS argued that interest should not have been limited to 6% and should have run from a date earlier than April 17, 1984. The D.C. Circuit issued two opinions. It originally reversed the district court on the issues of rate of interest and length of the interest period. On rehearing, however, the D.C. Circuit ultimately rejected both parties' arguments and affirmed the judgment of the district court in its entirety. Five days after the D.C. Circuit issued its second opinion, the District of Columbia Court of Appeals squarely rejected the construction of District of Columbia law adopted in this case. The D.C. Circuit nevertheless denied a timely rehearing petition calling that fact to the court's attention.

1. *The first opinion.* In its first opinion, the D.C. Circuit began its analysis by stating that " 'equitable adjustment' is a legal term of art; it signifies a principle designed 'to keep a contractor whole when the Government modifies a contract.' " App., *infra*, 29a (quoting *Bruce Construction Corp.* v. *United States*, 324 F.2d 516, 518 (Ct. Cl. 1963)). Applying that principle, the D.C. Circuit agreed with the district court that a $975,952 award was necessary to keep GRS whole. App., *infra*, 29a-32a.

The D.C. Circuit next addressed the interest issues. It acknowledged at the outset that " 'WMATA's sovereign immunity exists because the signatories [to the WMATA Compact] have successfully conferred their respective sovereign immunities upon it.' " App., *infra*, 33a (quoting *Morris* v. *WMATA*, 781 F.2d 218, 219 (D.C. Cir. 1986)).[2] The D.C. Circuit also recognized that this Court, in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), had reaffirmed the settled proposition that "a sovereign is immune from liability for interest unless it has waived its immunity by statute or contract." App., *infra*, 33a. Nevertheless, without ever again mentioning *Shaw*, the D.C. Circuit held that "WMATA has waived whatever immunity from prejudgment interest it otherwise enjoys" simply because the term "equitable adjustment" "imports into the contract a doctrine mandating a make-whole rem-

[2] In addition to *Morris*, cases affirming that Congress and the three signatories to the WMATA Compact have conferred sovereign immunity on WMATA include *Beatty* v. *WMATA*, 860 F.2d 1117, 1126-1127 (D.C. Cir. 1988); *Dant* v. *District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987); *Sanders* v. *WMATA*, 819 F.2d 1151, 1154-1155 (D.C. Cir. 1987); and *George Hyman Construction Co.* v. *WMATA*, 816 F.2d 753, 759 (D.C. Cir. 1987).

edy" and "restoration of a party to the *status quo ante* typically requires compensation for prejudgment interest." *Id.* at 33a-34a.

Finally, the D.C. Circuit considered GRS's challenges to the rate of interest and the date from which it was calculated. Because D.C. Code § 28-3302(a) provides for 6% interest "in the absence of express contract," the court reasoned that the "express term" of the contract requiring "equitable adjustment" made the statute inapplicable. "[O]nly by awarding prejudgment interest at the market rate," the court said, could GRS be made whole. App., *infra*, 35a. Similarly relying on a perceived overriding make-whole principle, the court held that prejudgment interest must run from the date in 1979 when WMATA withheld the funds from GRS and not, as the district court held, from the date in 1984 when the General Manager determined that the amount of the withholding was proper. *Id.* at 35a-36a. In support of those conclusions, the court cited *Pierce Associates, Inc.* v. *District of Columbia*, Civ. No. 6893-84 (D.C. Super. Ct. Jan. 27, 1986). App., *infra*, 37a.

2. *The second opinion.* WMATA petitioned for rehearing. It argued that the D.C. Circuit had not complied with the requirement of *Library of Congress* v. *Shaw*, *supra*, because it awarded prejudgment interest in the absence of an *express* waiver of sovereign immunity; that the court's decision on the interest rate issue relied on a decision that had been reversed in *District of Columbia* v. *Pierce Associates, Inc.*, 527 A.2d 306 (D.C. 1987); and that determining the date from which interest should run is a matter within the discretion of the trial court. The panel thereafter issued a new opinion superseding the first opinion.

The second opinion did not vary from the first in its discussion of the merits or the waiver of sovereign immunity. App., *infra*, 9a-15a. Thus, the D.C. Circuit once again held, without alluding to the express-waiver requirement of *Shaw*, that the mere use of the phrase "equitable adjustment" waived sovereign immunity against prejudgment interest. *Id.* at 13a-14a. On the interest rate issue, however, the D.C. Circuit recognized that its decision must be "controlled by *District of Columbia* v. *Pierce Associates*," which held that a departure from the statutory 6% rate is permissible only when the parties' contract specifies a different rate. App., *infra*, 16a. Accordingly, the D.C. Circuit limited the award of interest to 6%. The D.C. Circuit also agreed with WMATA that the setting of the date from which interest, if allowable, should run is a discretionary matter for the trial court, which in this case had not abused its discretion. *Id.* at 16a-19a.

3. *The denial of rehearing.* The D.C. Circuit issued its second opinion on May 12, 1989. On May 17, 1989, the District of Columbia Court of Appeals decided *District of Columbia* v. *C.J. Langenfelder & Son*, 558 A.2d 1155,[3] which held that the District of Columbia is not liable for prejudgment interest under an "equitable adjustment" clause entered into in 1968. The decision does not rely on sovereign immunity. Rather, as a pure matter of contract construction, the court held that any parties entering into a government construction contract in the 1960s or early 1970s would have understood that an "equi-

[3] On September 20, 1989, the D.C. Court of Appeals denied rehearing with suggestion of rehearing en banc in *Langenfelder*.

table adjustment" would not include prejudgment interest. 558 A.2d at 1159-1163. The D.C. Court of Appeals explicitly rejected the reasoning of the federal court of appeals in the present case: "[W]e find inappropriate the analysis set forth by the D.C. Circuit * * * in *General Railway Signal Co. v. Washington Metropolitan Area Transit Authority* * * *. We reject the perhaps linguistically-enticing, yet facile analysis relied upon in *General Railway* * * *." *Id.* at 1163.

WMATA filed a timely rehearing petition, with suggestion of rehearing en banc, on June 12, 1989. WMATA argued that the federal court of appeals was obliged to conform its construction of District of Columbia law to the definitive construction by the jurisdiction's highest court in *Langenfelder*. WMATA also renewed the argument that the D.C. Circuit's decision conflicts with *Library of Congress* v. *Shaw*, *supra*. The panel and the en banc court, however, both denied rehearing on September 11, 1989, without comment. App., *infra*, 53a-56a.[4]

REASONS FOR GRANTING THE PETITION

The actions of the D.C. Circuit in this case flatly contravene this Court's precedents in two respects. First, by failing to conform its decision to the binding interpretation of District of Columbia law by that jurisdiction's highest court, the D.C. Circuit has acted inconsistently with *Exxon Co., U.S.A.* v. *Banque de*

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[4] **The panel that denied rehearing consisted of Circuit Judges Edwards, R.B. Ginsburg, and Robinson. Judges Edwards and Ginsburg were drawn to replace Judge McGowan, who had died after participating in the original decision, and Judge Starr, who had resigned after participating in both panel decisions.**

Paris et des Pays-Bas, 109 S. Ct. 299 (1988), *Huddleston* v. *Dwyer*, 322 U.S. 232 (1944), and *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). In this case, the appropriate course would be the one taken in comparable circumstances last Term in *Exxon*: the Court should grant the petition, vacate the judgment of the D.C. Circuit, and remand for further consideration in light of *District of Columbia* v. *C.J. Langenfelder & Son*, 558 A.2d 1155 (D.C. 1989).

Second, the D.C. Circuit has wholly failed to heed the requirement of *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), that waivers of sovereign immunity against prejudgment interest be express. Thus, if the Court is not inclined to vacate the decision below summarily, it should grant certiorari in order to consider and correct the D.C. Circuit's departure from this Court's precedents.

I. THE D.C. CIRCUIT'S CONSTRUCTION OF DISTRICT OF COLUMBIA LAW CANNOT STAND IN THE FACE OF THE CONTRARY DECISION OF THE HIGHEST COURT OF THE DISTRICT OF COLUMBIA.

As the D.C. Circuit explicitly recognized, the contract in this case is governed by District of Columbia law. App., *infra*, 7a n.3, 13a, 16a. Therefore, sovereign immunity considerations aside, whether the "equitable adjustment" language of the changes clause provides for prejudgment interest depends on how the courts of the District of Columbia would construe that phrase. Whatever justification the D.C. Circuit might have had for adopting its own interpretation of that phrase at the time of its rulings, the justification disappeared when the D.C. Court of Appeals decided *District of Columbia* v. *C.J. Langen-*

felder & Son, supra. Langenfelder squarely holds that the phrase "equitable adjustment," as used in government contracts entered into before the mid-1970s, will not be construed to provide for prejudgment interest. 558 A.2d at 1159-1163. The contract in this case was entered into in 1971. The *Langenfelder* decision dictates that prejudgment interest not be awarded in this case. Indeed, the *Langenfelder* court took the opportunity to express its outright rejection of the decision below. *Id.* at 1163.

That the D.C. Circuit must follow the decisions of the D.C. Court of Appeals on matters of local law cannot be seriously disputed.[5] Indeed, in this very case, the federal court recognized that rule and reversed its own decision on the applicable interest rate on the ground that its decision was "controlled by" a D.C. Court of Appeals ruling limiting interest to 6%. App., *infra*, 16a. The D.C. Circuit acted differently, however, with respect to the *Langenfelder* decision and the basic question whether prejudgment interest was appropriate at all. After *Langenfelder* was called to the federal court's attention in WMATA's petition for rehearing, the court simply allowed its own inconsistent decision to stand, without comment.

That course of action is forbidden by the decisions of this Court. Just last Term, the Court vacated a

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[5] See *Pernell* v. *Southall Realty*, 416 U.S. 363, 368 (1974); *Keener* v. *WMATA*, 800 F.2d 1173, 1178 (D.C. Cir. 1986), cert. denied, 480 U.S. 918 (1987); *Hall* v. *C&P Telephone Co.*, 793 F.2d 1354, 1356-1358 (1986), rehearing denied, 809 F.2d 924 (D.C. Cir. 1987); *Norwood* v. *Marrocco*, 780 F.2d 110, 112-113 (D.C. Cir. 1986); *Lee* v. *Flintkote Co.*, 593 F.2d 1275, 1278-1279 n.14 (D.C. Cir. 1979); *United States* v. *Peterson*, 483 F.2d 1222, 1235 n.85 (D.C. Cir.), cert. denied, 414 U.S. 1007 (1973).

decision of the Fifth Circuit and remanded for further consideration in light of a decision of the Texas Court of Appeals. *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays-Bas, supra.* The Fifth Circuit decided an issue of Texas law on October 8, 1987. The court denied rehearing on December 8, 1987. The Texas Court of Appeals decided the same issue of Texas law contrary to the Fifth Circuit's decision on November 17, 1987. Exxon brought the Texas court's decision to the attention of the Fifth Circuit in pleadings filed after rehearing had been denied and the mandate had been issued. The Fifth Circuit denied relief on February 12, 1988.[6] This Court, however, vacated the decision of the federal court and remanded for further consideration in light of the decision of the Texas court. 109 S. Ct. 299 (1988).

A similar course is appropriate here. There are only two pertinent differences between *Exxon* and the present case, and both make this case even more appropriate than *Exxon* for action by this Court. First, in this case, unlike *Exxon*, the D.C. Circuit denied a *timely* petition for rehearing calling the contrary decision to its attention. Second, in *Exxon* there may have been some basis for questioning whether the Texas court's decision was in fact controlling; the Fifth Circuit on remand held that "its applicability to *Exxon* is not clear" and certified the question to the Supreme Court of Texas. *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays-Bas*, 867 F.2d 1524,

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[6] **The foregoing description of the procedural history in the *Exxon* case is taken from the petition for a writ of certiorari in that case (No. 87-1467) and from the brief for the petitioner that was filed in this Court after the Court granted certiorari but before it vacated the decision of the Fifth Circuit.**

1526 (5th Cir. 1989). Here, by contrast, the highest court of the District of Columbia has already stated its flat disagreement with the decision below. *Langenfelder*, 558 A.2d at 1163.

The D.C. Circuit's failure to conform its construction of local law to *Langenfelder* is also impermissible under this Court's decisions in *Huddleston* v. *Dwyer*, *supra*, and *Vandenbark* v. *Owens-Illinois Glass Co.*, *supra*. In *Vandenbark* this Court stated the principle that a federal court has a continuing duty to follow the decisions of the highest court of a state "until such time as a case is no longer *sub judice*." 311 U.S. at 543. In *Huddleston*, a case almost exactly like *Exxon*, the Court applied the *Vandenbark* principle even though the relevant state court decision was not rendered until after the federal court of appeals entered judgment and denied rehearing. In a full opinion, this Court remanded for further consideration in light of the decision of the state court. 322 U.S. at 237-238.

The principle that a federal court of appeals must conform to postjudgment decisions on controlling state law, as long as the case remains "*sub judice*," has been applied in several decisions of courts of appeals and summary dispositions by this Court. See *Braniff Airways, Inc.* v. *Curtiss-Wright Corp.*, 424 F.2d 427, 429-430 (2d Cir.), cert. denied, 400 U.S. 829 (1970); *Jones* v. *Schellenberger*, 225 F.2d 784, 791 (7th Cir. 1955), cert. denied, 350 U.S. 989 (1956); *Blaauw* v. *Grand Trunk Western Railroad*, 380 U.S. 127 (1965); *Carter Oil Co.* v. *Welker*, 317 U.S. 592 (1942); *Chase Securities Corp.* v. *Vogel*, 312 U.S. 666 (1941). Furthermore, this Court has applied the principles of *Huddleston* in two cases involving the construction of District of Columbia law.

Griffin v. *United States*, 366 U.S. 704, 718 (1949); *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72, 75 (1944). The actions of the D.C. Circuit in this case therefore conflict with these decisions as well.

The D.C. Circuit's error is patent. Accordingly, there should be no need for full briefing and argument in this case. The appropriate course would be to grant the petition, vacate the judgment of the D.C. Circuit, and remand for further consideration in light of *Langenfelder*.

II. THE D.C. CIRCUIT'S FINDING OF A WAIVER OF SOVEREIGN IMMUNITY IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN *LIBRARY OF CONGRESS* v. *SHAW*.

The binding decision of the D.C. Court of Appeals in *Langenfelder* demonstrates that, under District of Columbia law, the phrase "equitable adjustment" in a 1971 government contract does not provide for prejudgment interest. Even if there were some basis to distinguish *Langenfelder*, however, the question whether WMATA has waived its sovereign immunity against an award of prejudgment interest would remain for resolution. It follows *a fortiori* from the decision in *Langenfelder* that the phrase "equitable adjustment" at least is sufficiently ambiguous that it does not constitute an *express* waiver of WMATA's sovereign immunity against prejudgment interest. Indeed, the D.C. Circuit did not purport to find an express waiver of WMATA's sovereign immunity. To allow prejudgment interest in the absence of an express waiver is directly contrary to *Library of Congress* v. *Shaw*, *supra*.

The issue in *Shaw* was whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*,

waives the sovereign immunity of the federal government against prejudgment interest on attorneys' fees. The D.C. Circuit held that, by providing that "the United States shall be liable for costs the same as a private person" (42 U.S.C. § 2000e-5(k)), under circumstances where a private person would be liable for prejudgment interest, Congress waived the government's immunity against prejudgment interest. This Court disagreed.

The Court pointed out that prejudgment interest requires a waiver *separate* from the waiver of immunity from suit. 478 U.S. at 314. "[W]e must construe waivers strictly in favor of the sovereign," and "[t]he no-interest rule provides an added gloss of strictness upon these usual rules." *Id.* at 318. In particular, even the parties' intention to permit the recovery of interest will not suffice unless "translated into affirmative statutory or contractual terms." *Ibid.* (quoting *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947)). Measured against that standard, the language on which the D.C. Circuit relied in *Shaw* was not a sufficient waiver. *Id.* at 319-320. Nor had Congress waived sovereign immunity by providing in 42 U.S.C. § 2000e-5(k) for a "reasonable" attorney's fee. The Court squarely rejected reliance on such general language as a basis for awarding prejudgment interest, observing in particular that "*interest has been ruled unavailable under statutes or contracts directing the United States to pay the 'amount equitably due.'*" 478 U.S. at 320 (emphasis added) (quoting *Tillson* v. *United States*, 100 U.S. 43, 46 (1879)).[7]

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[7] The *Shaw* rule is identical to the law that would have been applied in the courts of each of the signatories to the WMATA

Nothing could possibly be clearer, under *Shaw*, than the rule that the mere use of such phrases as "equitable adjustment" will not suffice to provide the kind of separate, express waiver of sovereign immunity that is required in order for a court to award prejudgment interest. The "equitable adjustment" language used in the WMATA-GRS contract does not come nearly as close to being such a waiver as the language at issue in *Shaw*. Yet the D.C. Circuit has relied on that language to find a waiver, without any effort to reconcile its reasoning with *Shaw*. App., *infra*, 33a-34a. By finding a waiver of sovereign immunity against prejudgment interest in the absence of an *express* waiver, the D.C. Circuit has placed it-

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Compact at the time that the Compact was signed, and at the time that WMATA and GRS entered into the contract in the present case. See *Sheckels* v. *District of Columbia*, 246 U.S. 338 (1918); *Hammond* v. *State Roads Commission*, 241 Md. 514, 217 A.2d 258 (1966); *City of Lynchburg* v. *Amherst County*, 115 Va. 600, 80 S.E. 117 (1913). In addition, the *Shaw* rule applies to actions in federal court in which it is contended that a state instrumentality has waived its Eleventh Amendment immunity. *WJM, Inc.* v. *Massachusetts Department of Public Welfare*, 840 F.2d 996, 1006 (1st Cir. 1988). Finally, the *Shaw* rule has long been codified, for actions in the Court of Claims or U.S. Claims Court, in 28 U.S.C. § 2516(a), which disallows interest against the United States unless a contract or statute expressly provides for it. See *Getty Oil Co.* v. *United States*, 767 F.2d 886, 889 n.12 (Fed. Cir. 1985). Although there is now a statute that generally allows prejudgment interest in actions on contracts with the United States (41 U.S.C. § 611), the phrase "equitable adjustment" in a contract has long been held insufficient to meet the express-provision requirement. See *Dravo Corp.* v. *United States*, 594 F.2d 842 (Ct. Cl. 1979); *Framlau Corp.* v. *United States*, 568 F.2d 687 (Ct. Cl. 1977); *Singer Co.* v. *United States*, 568 F.2d 695 (Ct. Cl. 1977).

self squarely in conflict with *Shaw* and with the decisions of other courts of appeals following *Shaw*. See *McGehee* v. *Panama Canal Commission*, 872 F.2d 1213, 1216 (5th Cir. 1989); *WJM, Inc.* v. *Massachusetts Department of Public Welfare*, 840 F.2d at 1006. Such square contradiction of this Court's decisions should not be permitted.

The decision below not only departs from decisions of this Court and conflicts with the decisions of other courts of appeals; it also raises an issue of fiscal importance for WMATA and the governmental units that ultimately bear the burden of funding WMATA's construction program.[8] Although WMATA can take steps to assure that future contracts will not be construed to permit prejudgment interest on amounts awarded under "changes" clauses or other contract clauses, it is too late to avoid the effect that the D.C. Circuit's decision (if not reviewed by this Court) will have on the numerous contracts that were entered into before the decision below was rendered. WMATA is involved in at least ten cases in the administrative process or in the United States District Court for the District of Columbia, with potential liability for prejudgment interest running well into the millions of dollars, in which the decision below could lead to the imposition of prejudgment interest without any express waiver of sovereign immunity. Because the decision below creates a differing interpretation of District of Columbia law for suits brought in federal court than for those in the District of Columbia courts, plaintiffs wishing to sue WMATA (or per-

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[8] For a discussion of how WMATA's costs are funded by the signatories to the WMATA Compact, see *Morris* v. *WMATA*, 781 F.2d at 225-227.

haps other governmental defendants) to recover prejudgment interest also will have an incentive for forum shopping. See *Lee* v. *Flintkote Co.*, 593 F.2d at 1278-1279 n.14. WMATA (and ultimately the taxpayers) should not have to pay millions of dollars because the D.C. Circuit has elected not to follow binding precedent.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below should be vacated, and the case should be remanded for further consideration in light of *Langenfelder*. In the alternative, the petition for a writ of certiorari should be granted, and the case should be set for full briefing and argument.

Respectfully submitted.

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DECEMBER 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 29, 1986 Decided May 12, 1989

No. 85-5753

GENERAL RAILWAY SIGNAL CO.,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, APPELLANT

No. 85-5768

GENERAL RAILWAY SIGNAL CO., APPELLANT

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 84-01717)

Before: ROBINSON and STARR, *Circuit Judges*, and MCGOWAN,* *Senior Circuit Judge*.

Opinion *Per Curiam*.

PER CURIAM: This case involves a contract dispute between the General Railway Signal Company ("GRS"

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* *Senior Circuit Judge* MCGOWAN did not participate in this opinion.

or "General Railway") and the Washington Metropolitan Area Transit Authority ("WMATA" or "the Authority"). The dispute concerns what amount should be deducted as an equitable adjustment for the elimination of part of certain work that General Railway contracted to perform on WMATA's subway system. Reviewing decisions by the General Manager of WMATA that responded to recommendations by the Army Corps of Engineers Board of Contract Appeals, the District Court entered judgment in favor of General Railway for $975,952 as principal and for $65,455.63 in interest. On appeals by both parties, we affirm the District Court's award of principal and interest as well as its decision as to the date from which such interest is to be calculated.

I

Although contractual relations between General Railway and WMATA date back over 16 years, the facts pertinent to the resolution of this controversy can be briefly stated.

In September 1971, the parties executed a lump-sum contract in the amount of $42,074,675.30. Of particular relevance to this case, GRS undertook to install wayside equipment for the automatic train control system and cables to connect that equipment to the train control room. The contract as originally executed called for GRS to excavate trenches alongside the train tracks for burial of the cable and to refill the trenches following installation.

In preparing to bid on the subway project, General Railway entered into a subcontract with L. K. Comstock to perform much of the work, including the "trenching" work just described. The original subcontract between General Railway and Comstock provided for a lump-sum price of $34,491,410. Only after executing the subcontract did GRS seek, and Comstock provide, a breakdown

of the lump-sum price into separate figures for various components of the work. The items into which Comstock allocated the lump sum accorded with line item figures WMATA required to be specified in the bids for the prime contract. GRS then incorporated these line item figures into the bid it subsequently submitted to WMATA. The prices for the three phases of the subway project listed in the unit price schedule of GRS' bid totalled $1,336,500 for the trenching work.[1]

Before the trenching work began, however, WMATA decided to have the cables installed in aboveground duct-banks rather than in underground trenches. WMATA's change of mind eliminated the need to have GRS, through its subcontractor, carry out this portion of its original contract. At the same time, it triggered the operation of the "Changes" clause of the prime contract. That clause provides in pertinent part as follows:

> If any change . . . causes an increase or decrease in the Contractor's cost of . . . the performance of any part of the work under this contract an equitable adjustment shall be made and the contract modified in writing accordingly.

WMATA-GRS Contract § 1.3(d), Record Excerpts ("R.E.") at 47.

The parties thereafter failed to agree on the amount properly credited to WMATA by virtue of the deleted work, thereby triggering the dispute resolution provision of the prime contract. See *id.* § 1.6, R.E. at 48-49. That clause designates WMATA's Board of Directors or its designated representative as the arbiter of contract dis-

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[1] On September 29, 1971, Comstock's rights and duties under the subcontract were assigned to a joint venture consisting of Comstock and Fischback & Moore, Inc. *General Ry. Signal, Co.*, ENG BCA No. 3970, ¶ 5, at 2 (Dec. 30, 1983), Record Excerpts ("R.E.") at 2. For simplicity's sake we will use "Comstock" to refer to both the original subcontractor and its assignee.

putes that cannot be resolved between the parties. *Id.* § 1.6(a). WMATA's Procurement Regulations, in turn, designate the General Manager of WMATA as the Board's representative for these purposes. WMATA Brief at 3. In addition, the Board by resolution has authorized the Board of Contract Appeals of the Army Corps of Engineers to hear such disputes initially and propose resolutions to the General Manager. See *id.*

The dispute before the Board of Contract Appeals centered on whether the $1.3 million figure allocated to trenching work by GRS in its bid to WMATA (and subsequently included in the unit price schedule of the prime contract) accurately reflected the reasonable costs of performing that work (were it in fact to be performed). WMATA took the position that the three line-item totals for trenching work did approximate costs and therefore provided an appropriate basis for calculating an equitable adjustment. GRS, in contrast, argued that the line item figures for trenching were merely arbitrary allocations and that the actual costs of the deleted work were much lower. To support this assertion, General Railway pointed to estimates obtained by WMATA itself fixing the cost of trenching at about half the line item total.

The Board of Contract Appeals nonetheless decided that the line items supplied in GRS's bid (and thereafter in the contract's unit price schedule) were presumptively reasonable and that GRS "ha[d] not carried the burden of proving that the bid prices [were] not a reasonable price for the deduction." *General Railway Signal Co.*, ENG BCA No. 3970, at 14 (Dec. 30, 1983) [hereinafter *Initial Board Decision*], R.E. at 1, 14. In addition to this amount, the Board concluded, an additional five percent should be added to reflect GRS's reasonable profit on the deleted work. It therefore recommended that as an equitable adjustment WMATA be credited a total of $1,403,325 for the eliminated trench-

work. *Id.* at 15, R.E. at 15. The General Manager of WMATA approved and adopted this decision. Final Decision of General Manager, *General Railway Signal Co.*, WMATA Contract No. 1Z2011, ENG BCA No. 3970 (Apr. 7, 1984), R.E. at 20.

On review of the General Manager's decision, the District Court reversed. It rejected the Board of Contract Appeals' reliance on the bid price of $1.3 million. In the court's view, that figure was "simply an allocation required by WMATA for administrative purposes from successful bidders under lump-sum contracts." *General Railway Signal Co.* v. *WMATA*, 598 F. Supp. 595, 597 (D.D.C. 1984) [hereinafter *Initial District Court Opinion*]. The contract price did not necessarily reflect the true costs of the deleted trenching work. Accordingly, the court granted GRS's motion for summary judgment and remanded to the Board of Contract Appeals to determine "a reasonable cost estimate" for the work. *Id.* at 598 (emphasis omitted). In addition, the court directed the Board to calculate interest on that amount "as provided by law." *Id.* at 597. WMATA's immediate appeal of the court's decision was dismissed as premature. *General Railway Signal Co.* v. *WMATA*, No. 84-5900 (D.C. Cir. order dated Mar. 27, 1985).

On remand, the Board of Contract Appeals examined in detail various estimates of cost advanced by the parties. WMATA clung to the contention that the line item price in the unit price schedule accurately reflected cost. The Board rejected this argument, however; it decided that the most accurate basis for calculating reasonable cost was an estimate from WMATA's own expert, Bechtel Corp. Bechtel had supplied WMATA with an estimate during the period immediately after elimination of the trenching work in the protracted period when WMATA and GRS were attempting to negotiate a settlement on their own. *General Railway Co.*, ENG BCA No. 3970, at 10 (Mar. 29, 1985) [hereinafter *Board Decision on*

Remand], R.E. at 28, 36. The Board made an adjustment to Bechtel's estimate to take into account: (1) inclusion in the estimate of costs of trenching that were unnecessarily redundant; (2) inclusion in the estimate of costs attributable to a degree of soil compaction that exceeded what was appropriate or, presumably, contemplated by the parties; and (3) a mark up of 9.73%, proposed by both parties to reflect the contemplated profits of GRS and its subcontractor. *Id.* at 6, 10, R.E. at 33, 36. As a result of these calculations, the Board arrived at a credit due WMATA of $360,548. Under this determination, GRS was entitled to the amount of $975,952, which represented the difference between $1,336,500 (the amount withheld from GRS) and $360,548, the amount fixed by the Board as an equitable adjustment. See *General Railway Signal Co.* v. *WMATA*, 625 F.Supp. 22, 23 n.2 (D.D.C. 1985) [hereinafter *District Court Opinion After Remand*]. The Board declined to reach the issue of the interest properly awarded on this amount, however, because "WMATA's liability for interest in connection with equitable adjustments is now pending . . . in several cases." *Board Decision on Remand* at 11, R.E. at 37.

The General Manager of WMATA refused to adopt the Board's recommendation. Instead, the General Manager reaffirmed her previous approval of the Board's first decision, which had adopted the line item figures for trenching as the proper equitable adjustment. Final Decision of General Manager, *General Railway Signal Co.*, WMATA Contract No. 1Z2011, ENG BCA No. 3970 (Apr. 5, 1985), R.E. at 39. GRS moved the District Court for judgment in its favor in accordance with the Board's recommendation.

The District Court upheld the decision of the Board as against the contrary view of the General Manager. *District Court Opinion After Remand*, 625 F.Supp. at 24. The former, it concluded, was "in accord with the Court's

[previously articulated] view of the applicable law and was based on undisputable facts." *Id.* Furthermore, the trial court concluded, "WMATA ha[d] presented no substantial reasons for rejecting the Board's decision." *Id.*

In addition to $975,952 in principal, the court awarded interest to General Railway on this amount. WMATA had waived sovereign immunity from interest, the court found, in its contract with GRS. *Id.* at 25.[2] The court further decided that the date from which prejudgment interest was properly calculated was April 17, 1984, the date on which WMATA's Board of Directors, through its General Manager, finally decided to withhold the full line item amounts for trenching. *Id.* at 24. The District Court fixed the rate of interest at six percent, relying on the statutory limit prescribed in D.C. Code Ann. § 28-3302(a) (Supp. 1988) ("upon the loan . . . of money . . . in the absence of expressed contract.") [3] The court thus rejected General Railway's argument that WMATA had not only waived generally its immunity from awards of interest

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[2] The District Court specifically identified as the provision by which WMATA waived sovereign immunity "the 'equitable adjustment' language in the 'Changes' clause of the contract." 625 F. Supp. at 24. That clause was quoted in relevant part *supra* text at 4. The court reasoned that the legal concept of equitable adjustment is meant "to keep a contractor whole when the Government modifies a contract," and that "[p]rejudgment interest may be necessary to restore the contractor to the status quo prior to a change in the contract." *Id.*

[3] The statute more fully provides as follows:

> The rate of interest in the District [of Columbia] upon the loan or forbearance of money, goods, or things in action in the absence of expressed contract, is 6 percent per annum.

D.C. Code Ann. § 28-3302(a) (Supp. 1988). The contract between GRS and WMATA was executed and substantially performed in the District of Columbia; on this basis, its law was determined by the court to apply in this case. The parties have presented no reason why the law of another jurisdiction should be applied, nor do we discern any.

but had also waived the specific statutory limit in the Code. In the District Court's view, this argument "extend[ed] WMATA's waiver too far. The local provision clearly was intended to make six percent the applicable rate unless the parties fixed some other rate. No such rate was fixed here." 625 F.Supp. at 25. The District Court also awarded post-judgment interest to General Railway pursuant to D.C. Code Ann. § 28-3302(c) (Supp. 1988).[4]

II

On appeal, WMATA argues that the District Court erroneously concluded that the line item figures for trenching did not reflect the reasonable cost of that work. WMATA also asserts that it should be immune from prejudgment interest. Finally, WMATA maintains that its liability for post-judgment interest is limited to four percent by virtue of D.C. Code Ann. § 28-3302(b) (Supp. 1988).

General Railway, predictably, is satisfied with the District Court's award of principal. It contends that the court fell into error in its award of interest, however. First, it argues that prejudgment interest should have been calculated from the date on which WMATA's Contracting Officer issued his preliminary decision to withhold $1.3 million from GRS. Second, GRS maintains that the court erred in capping the rate of prejudgment interest

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[4] Section 28-3302(c) provides in relevant part as follows:

> The rate of interest on judgments and decrees, where the judgment or decree is not against the District of Columbia or where the rate of interest is not fixed by contract, shall be 70 percent of the rate of interest set by the Secretary of the Treasury pursuant to [26 U.S.C. § 6621 (1982)] for underpayments and overpayments of tax to the Internal Revenue Service....

D.C. Code Ann. § 28-3302(c) (Supp. 1988).

at six percent. We consider in turn the awards of principal and interest.[5]

A

The contract between General Railway and WMATA provides for "equitable adjustments" in instances where WMATA modifies the contract so as to increase or decrease the costs of work to be performed. The term "equitable adjustment" is a legal term of art; it signifies a principle designed "to keep a contractor whole when the Government modifies a contract." *Bruce Construction Corp.* v. *United States*, 324 F.2d 516, 518 (Ct. Cl. 1963). The proper measure of the adjustment is "the difference between what it would have cost to perform the work as originally required and what it cost to perform the work as changed." *Modern Foods, Inc.*, ASBCA 2090, 57-1 B.C.A. (CCH) ¶ 1229 (1975); see also *Bruce Construction*, 324 F.2d at 518-519. The primary dispute in this case has been and remains whether the $1.3 million line item figures contained in the unit price schedule of the prime contract establish the reasonable costs of the trenching work eliminated by WMATA. Like the District Court, we are convinced that they do not.

As an initial matter, we do not accept WMATA's contention that these figures, quoted to General Railway by the subcontractor and then employed by GRS in its bid to WMATA, should be treated as sacrosanct. WMATA Brief at 33-37. To be sure, when parties have struck a bargain and included a specific price for work to be performed, that price is presumed to represent the reasonable costs of the work. See, e.g., *Nager Electric Co.* v.

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[5] In reviewing disputes that arise under the "Disputes" clause of WMATA's subway contracts, this court has applied the contractually prescribed standard of review "which allows a court to reverse determinations of the General Manager when they are arbitrary, capricious, unsupported by substantial evidence, or incorrect as a matter of law." *George Hyman Constr. Co.* v. *WMATA*, 816 F.2d 753, 757 (D.C. Cir. 1987). We shall do the same.

United States, 442 F.2d 936, 946 (Ct.Cl.1971); see also *Bruce Construction*, 324 F.2d at 518-519; *S.N. Nielsen Co.* v. *United States*, 141 Ct.Cl. 793, 797 (1958); *B-E-C-K-Christensen Raber-Kief & Associates*, ASBCA 16467, 73-1 B.C.A. (CCH) ¶ 9884 (1973). At the same time, courts have consistently rejected efforts to equate bid prices for various portions of work with contract prices. The reason is judicial recognition that contractors frequently submit unbalanced bids, understating the true costs of one portion of the contract with an offsetting overstatement on a different portion. For the reasons that follow, we agree with the District Court that, in this case, the $1.3 million line item totals were not contractually agreed upon prices at which the work in question was to be performed; those line item totals therefore do not presumptively reflect the reasonable costs of that work.

For one thing, the bid prices for the three phases of trenching were supplied by the subcontractor (Comstock) to General Railway only after the GRS-Comstock subcontract had been executed on a lump-sum basis. See *Initial Board Decision* ¶¶ 7-9, at 3, R.E. at 3; *id.* at 16 (Sheridan, ALJ, dissenting), R.E. at 16. General Railway requested the breakdown of line item totals not as a precondition to agreement with the subcontractor, but rather, after the agreement had been reached, for General Railway's use in the unit price schedule required by WMATA.[6] Even more importantly, the prime contract with WMATA was likewise a lump-sum contract. See *Board Decision on Remand* ¶¶ 8-9, at 2-3, R.E. at 30. Further evidence appears in the fact that progress payments under the prime contract bore no relationship to

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[6] In fact, the lump-sum GRS-Comstock subcontract did not expressly include the bid prices for trenching. They were implicitly incorporated by virtue of a clause incorporating WMATA's Invitation For Bid, which included the unit price schedule on which line items were listed. See *Board Decision on Remand*, at 3, R.E. at 30.

the unit price schedule of which the line items were a part. *Initial District Court Opinion*, 598 F.Supp. at 597. Finally, the line items were apparently based on a flat rate of $5 per linear foot that could not be supported in the hearings before the Board. *Id.* The want of support is explained in part by the fact that the $5 flat rate was based merely on an oral quotation supplied to Comstock by excavators opining, without even knowing the type of material to be excavated, that the appropriate price range for the work with $2 to $5 per foot. Comstock then used the uppermost boundary of this range in its own bid to GRS, assuming that it was a "safe figure." *Board Decision on Remand* ¶ 17, at 5, R.E. at 32. The rather casual way in which the price range was provided, and Comstock's apparently offhand use of the high end in providing GRS with a further breakdown of the lump-sum subcontract strongly suggest that the line item totals derived from the flat rate were not contractually agreed upon prices. Cf. *Nager*, 442 F.2d at 947-948.

Even if the line items were deemed contract prices, GRS submitted ample evidence to defeat the presumption of reasonableness typically accorded contract prices. The line item figures are grossly disproportionate to all three of WMATA's own estimates of actual cost, which ranged from $566,000 to about $650,000. See *Initial District Court Opinion*, 598 F.Supp. at 597. Even assuming *arguendo* that the flat rate of $5 per foot reasonably reflected the direct costs of trenching, the $1.3 million total line item figures would still stand condemned as unreasonable because they included an enormous 161.5% mark-up to cover profits and indirect costs. *Board Decision on Remand* ¶ 21, at 5-6, R.E. at 32-33. This top-heavy add-on is wholly disproportionate to the relatively modest indirect costs and the 9.73% profit figure employed in an estimate furnished to WMATA of the costs of the work that included these elements. See *Board Decision on Remand* ¶¶ 22, 27, at 6-7, R.E. at 33-34. Thus, the District

Court was justified in remanding the case to the Board for a determination of reasonable costs, since the Board's initial reliance on the line items was misplaced.

For essentially the same reasons, we can discern no basis for setting aside the Board's determination on remand that $360,548 was an accurate approximation of the reasonable cost of the originally contemplated trenching work. This estimate was based on the Bechtel estimate that, as we mentioned above, WMATA itself obtained at the time the parties were attempting to negotiate a settlement. See *supra* text at 6. The Board's most significant adjustment to this estimate was to lower the amount of redundant trenching upon which the estimate was based. See *Board Decision on Remand* at 10, R.E. at 36. This reduction finds ample support in the record. The amount of redundant trenching assumed appropriate by the Board was the average of the amounts employed in the three WMATA estimates. See *id.* at 9-10, R.E. at 35-36. In deciding to utilize an average of the three estimates, the Board took into account the physical characteristics of the job site that would necessarily limit the extent of redundant trenching below that assumed in the Bechtel estimate. *Id.* at 9, R.E. at 35.

In opposing the Board's approach, WMATA primarily renews its argument that the line item figures reflect reasonable costs. At the same time, it offers no substantial reasons why the Board's estimate is unreasonable. See Final Decision of General Manager, R.E. at 39.

We therefore affirm the District Court's judgment insofar as it fixed the principal due GRS at $975,952. We next consider the court's award of interest.

B

Our review of the District Court's award of prejudgment interest requires us initially to consider whether WMATA enjoys sovereign immunity from liability for in-

terest. If it does not, we must then determine the date from which interest was properly calculated and the applicable rate.

1

WMATA is an instrumentality of each of the signatories—Maryland, Virginia, and the District of Columbia—to the Compact that created the Authority. See D.C. Code Ann. § 1-2431 (1981). As such, "WMATA's sovereign immunity exists because the signatories have successfully conferred their respective sovereign immunities upon it." *Morris* v. *WMATA*, 781 F.2d 218, 219 (D.C. Cir. 1986). It is well-settled that a sovereign is immune from liability for interest unless it has waived its immunity by statute or contract. See, e.g., *United States* v. *North Carolina*, 136 U.S. 211 (1890). The Supreme Court has only recently reaffirmed this general proposition. See *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

In creating WMATA, the signatories (with Congress' authorization, see *Morris*, 781 F.2d at 219) expressly provided that the Authority could be held liable to some extent for damages arising out of contracts. Section 80 of the Compact provides in relevant part:

> The Authority shall be liable for its contracts and for its torts . . . committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory . . . but shall not be liable for any torts occurring in the performance of a governmental function. . . .

D.C. Code Ann. § 1-2431 ¶ 80 (1981). Applying the law of the District of Columbia, we conclude that under the circumstances of this case WMATA has waived whatever immunity from prejudgment interest it otherwise enjoys.

We base our conclusion on the contract between WMATA and GRS. The "Changes" clause of that contract, as we have seen, authorizes "equitable adjustments" in cases like this. This term imports into the contract a doctrine mandating a make-whole remedy that will restore a contractor to the contractor's pre-change circumstances.

Courts have long recognized that restoration of a party to the *status quo ante* typically requires compensation for prejudgment interest, since it is an actual element of the costs incurred by virtue of the other party's conduct. See *Maryland Port Administration* v. *C.J. Langenfelder & Son, Inc.*, 438 A.2d 1374 (Md. Ct. Spec. App. 1982); see also *Bebchick* v. *Washington Metropolitan Area Transit Commission*, 645 F.2d 1086, 1093 (D.C. Cir. 1981).[7] Thus, in agreeing wholly to compensate GRS for any costs sustained as a result of modifications in the work it wanted performed, WMATA waived its immunity from prejudgment interest, which in this case constituted a significant portion of those costs. See *supra* note 7.

Two further considerations buttress our conclusion that WMATA does not enjoy sovereign immunity from liability for prejudgment interest. First, the District of Columbia itself, from whom WMATA's imunity in this case derives, has on at least one occasion been held liable for interest as an element of damages under section 15-108 of the D.C. Code.[8] In *District of Columbia* v. *Pierce Associates, Inc.*, 527 A.2d 306 (D.C. 1987), the court or-

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[7] That prejudgment interest may constitute a significant element of damages is evident on the facts of this case. Even assuming for a moment that the District Court correctly held that interest should run from April 17, 1984, the date of WMATA's administrative decision on the equitable adjustment, and be limited to six percent, GRS would be entitled to over $65,000. See Reply Brief of GRS at 52 (chart comparing amounts of interest due under various theories of parties).

[8] Section 15-108 provides:

> In an action in the United States District Court for the District of Columbia or the Superior Court of the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.

D.C. Code Ann. § 15-108 (1981).

dered the District to pay interest for its delay in making payment pursuant to the terms of a settlement agreement between it and a contractor. In an analogous context, the District recently enacted a statute permitting awards of interest against it for failures timely to pay for goods and services. See D.C. Code Ann. § 1-1172 (Supp. 1988). Second, in a case involving the same parties now before us, this court has upheld the decision of a trial court awarding interest against WMATA for unreasonable delay in making an equitable adjustment under a contract. See *General Railway Signal Co. v. WMATA*, 664 F.2d 296 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 915 (1981), *aff'g* 527 F.Supp. 359, 361 (D.D.C. 1979) (action for breach of contract arising under D.C. Code Ann. § 15-109).

Accordingly, we hold that the District Court correctly determined that WMATA has no sovereign immunity from an award of interest in this case.

2

The two issues remaining concern the rate at which prejudgment interest should be set and the date from which it should accrue. We now address each of these problems in turn.

The District Court, in reliance on D.C. Code Ann. § 28-3302, limited the rate of prejudgment interest due GRS to six percent. That section specifies that "[t]he rate of interest in the District [of Columbia] upon the loan or forbearance of money, goods, or things in action in the absence of expressed contract, is 6 percent per annum." D.C. Code Ann. § 28-3302(a) (Supp. 1988). GRS insists that the equitable adjustment provision in its contract with WMATA is an "expressed contract," and that the market rate of interest should apply in order to make GRS whole. This argument invokes D.C. Code Ann. § 15-109 (1981), which permits trial courts to award prejudgment interest as an element of damages

for breach of contract when needed to provide full compensation.[9] WMATA, on the other hand, points out that the equitable adjustment clause in the contract did not specify any particular interest rate, and contends that on this account Section 28-3302's six percent restriction should apply.

Our decision on rate of interest is controlled by *District of Columbia* v. *Pierce Associates* wherein the District of Columbia Court of Appeals held that "just as the trial court cannot award interest at a rate greater than 6% under Section 15-108 [pertaining to liquidated claims], it also cannot under Section 15-109, unless an express contractual provision is to the contrary." *Id.* at 311. The court rejected the contention that Section 15-109 conferred on trial judges a discretionary power to award interest at a higher rate as an element of damages, even though doing so would produce an equitable result. *Id.* at 310. Insofar as a prejudgment rate is concerned, the court said, any recovery above the statutory six percent must be premised on contractual language clearly evidencing the parties' intent to adhere to a specific rate. *Id.* at 311. The fact that the contract called for an equitable adjustment, the court added, did not alter this result. *Id.* Guided, as we must be, by the law of the District of Columbia, we affirm the District Court's determination that the applicable rate of prejudgment interest is six percent per annum.

The second inquiry we must make relates to the date from which interest at that rate is to accrue. The Dis-

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[9] D.C. Code § 15-109 states:

> In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff.

D.C. Code Ann. § 15-109 (1981).

trict Court selected April 17, 1984, the date on which WMATA's general manager adopted the final findings of the Army Corps of Engineers Board of Contract Appeals as to the deductions attributable to the elimination of the trenching work. GRS contends that January 17, 1979, the date on which monies due GRS were first withheld, is the proper date. In resolving this dispute, we look to the pertinent statutes and relevant judicial interpretations.

Section 15-108, which is applicable to liquidated debts, provides for "interest on the principal debt from the time when it was due and payable, at the rate fixed in the contract, if any, until paid." D.C. Code Ann. § 15-108 (1981). Clearly, though, WMATA's debt to GRS was not liquidated. On the other hand, Section 15-109, governing interest on unliquidated debts arising from contract breaches, proclaims a general rule that interest is to run "from date of judgment only." See also *Edmund J. Flynn Co.* v. *LaVay*, 431 A.2d 543 (D.C. 1981). There is, however, the statutory exception for interest awarded as an element of damages, and that, as authoritatively construed, charts the course to be pursued here. *District of Columbia* v. *Pierce* recognized that the court's "discretionary equitable power" under Section 15-109 "extend[s] . . . to the fixing of the effective *date*, not [the] *rate*, of such interest in contract cases in which the debt is unliquidated." *Id.* at 310 (footnote omitted) (emphasis in original).

Section 15-109 expressly refers only to "action[s] to recover for breach of contract," D.C. Code Ann. § 15-109 (1981), but it has been applied to a suit for accounting which, "although not framed as a breach of contract action, was based on a contractual relationship between the parties." *House of Wines* v. *Sumter*, 510 A.2d 492, 499 (D.C. 1986). We ourselves have considered Section 15-109 as stating the principle governing a contractor's suit precipitated by unreasonable delay by WMATA in

making payment pursuant to the equitable adjustment provision of a contract. See *General Railway Signal Co.* v. *WMATA*, 664 F.2d at 296. "[T]he disputed contract," we said, "included an implied condition requiring WMATA to make equitable adjustments of claims under the contract within a reasonable time." *Id.*

In the present case, Section 15-109 is plainly applicable. The equitable adjustment provision imposed a contractual duty on WMATA which it allegedly breached in 1979 by withholding an excessive amount of progress payments. The District Court ruled that interest would run from April 17, 1984, the date on which WMATA's general manager finally decided to withhold the full line items for trenching.

To be sure, in *Granite-Groves* v. *WMATA*, 845 F.2d 330, 343 (D.C. Cir. 1988), we declared that a contractor who has been subjected to unreasonable delay is entitled to recover interest for the full period until the claim is paid." But we have never departed from the fundamental principle that the factfinder is to be indulged broad latitude in determining the point from which extent interest is to be awarded as an element of damages. In *Dyker Bldg. Co.* v. *United States*, 182 F.2d 85 (D.C. Cir. 1950), alluding to "the weight to be accorded to the action taken in the District Court," *id.* at 91, we affirmed a decision to grant interest from the date the contractor's final invoice was submitted. In *Flanaghan* v. *Charles H. Tompkins Co.*, 182 F.2d 92, 93-94 (D.C. Cir. 1950), we stated more fully:

> [T]here are many situations in which courts have allowed interest as an element of damages despite the existence of a real controversy and despite the fact that the claim had not been reduced to a liquidated amount. But under the statutory provisions in this jurisdiction, vesting as it does a broad measure of discretion in the jury or trial court, we should not

> lightly disturb the finding of the trial judge in a case such as the present. Certainly we find no abuse of discretion.

In the case at bar, the District Court elaborated its reasons for its conclusion that April 17, 1984, was the point at which interest was to begin to accrue:

> GRS seeks interest from the date of the contracting officer's final decision to withhold $1,336,500, on January 17, 1979. However, because this was subject to administrative appeal, this did not become WMATA's final decision under Article II, the disputes clause of the contract, until WMATA's board of directors acted through its designated representative, the WMATA general manager. That decision was rendered on April 17, 1984. There is no indication that this decision was unreasonably delayed so as to entitle GRS to interest from an earlier date. *See General Railway Signal Co. v. WMATA*, 664 F.2d 296 (D.C. Cir. 1980) (per curiam). The Court concludes that prejudgment interest on the $975,592 is due to GRS as of April 17, 1984.

District Court Opinion After Remand, 625 F.Supp. at 24. We find no abuse of discretion in this regard, and accordingly affirm the District Court.

We hold that the District Court correctly ruled that WMATA has no sovereign immunity from an award of prejudgment interest. We also sustain the court's decision both as to the rate of prejudgment interest awarded and the date from which it was to be calculated. Although WMATA includes, as one of the issues on appeal, the court's allowance of post-judgment interest, pursuant to D.C. Code Ann. § 15-109, see Brief for Appellee at 60,[10] it advances no substantial reason to justify an upset

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[10] WMATA argues, in a solitary clause of its lengthy brief, that D.C. Code Ann. § 28-3302(b) (Supp. 1988) applies in this case and requires that post-judgment interest be limited to 4 percent. That

of that determination. We therefore affirm the award of post-judgment interest according to the formula set forth in D.C. Code Ann. § 28-3302(c) (Supp. 1988), providing 70 percent of the rate fixed by the Secretary of Treasury for overpayments and underpayments of federal taxes. See 26 U.S.C. § 6621 (1982).

Affirmed.

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provision, however, governs only "judgments . . . against the District of Columbia." *Id.* WMATA has advanced no reasons in support of treating WMATA, a creature of interstate compact, designed to be an instrumentality of three jurisdictions, as the District of Columbia. See *Morris*, 781 F.2d at 218. In the absence of any such reasons, we reject this argument, which WMATA itself does not appear to entertain seriously.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5753

GENERAL RAILWAY SIGNAL CO.,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
APPELLANT

No. 85-5768

GENERAL RAILWAY SIGNAL CO., APPELLANT

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 84-01717)

Argued April 29, 1986
Decided August 21, 1987

Before: ROBINSON and STARR, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge.*

Opinion *Per Curiam.*

PER CURIAM: This case involves a contract dispute between the General Railway Signal Company ("GRS" or "General Railway") and the Washington Metropolitan

Area Transit Authority ("WMATA" or "the Authority"). The dispute concerns what amount should be deducted as an equitable adjustment for the elimination of part of certain work that General Railway contracted to perform on WMATA's subway system. Reviewing decisions by the General Manager of WMATA that responded to recommendations by the Army Corps of Engineers Board of Contract Appeals, the District Court entered judgment in favor of General Railway for $975,952 as principal and for $15,455.63 in interest. On appeals by both parties, we affirm the District Court's award of principal but reverse its award of interest as improperly calculated.

I

Although contractual relations between General Railway and WMATA date back over 16 years, the facts pertinent to the resolution of this controversy can be briefly stated.

In September 1971, the parties executed a lump-sum contract in the amount of $42,074,575.33. Of particular relevance to this case, GRS undertook to install wayside equipment for the automatic train control system and cables to connect that equipment to the train control room. The contract as originally executed called for GRS to excavate trenches alongside the train tracks for burial of the cable and to refill the trenches following installation.

In preparing to bid on the subway project, General Railway entered into a subcontract with L.K. Comstock to perform much of the work, including the "trenching" work just described. The original subcontract between General Railway and Comstock provided for a lump-sum price of $34,491,410. Only after executing the subcontract did GRS seek, and Comstock provide, a breakdown of the lump-sum price into separate figures for various components of the work. The items into which Comstock

allocated the lump sum accorded with line item figures WMATA required to be specified in the bids for the prime contract. GRS then incorporated these line item figures into the bid it subsequently submitted to WMATA. The prices for the three phases of the subway project listed in the unit price schedule of GRS's bid totalled $1,336,500 for the trenching work.[1]

Before the trenching work began, however, WMATA decided to have the cables installed in aboveground ductbanks rather than in underground trenches. WMATA's change of mind eliminated the need to have GRS, through its subcontractor, carry out this portion of its original contract. At the same time, it triggered the operation of the "Changes" clause of the prime contract. That clause provides in pertinent part as follows:

> If any change . . . causes an increase or decrease in the Contractor's cost of . . . the performance of any part of the work under this contract an equitable adjustment shall be made and the contract modified in writing accordingly.

WMATA-GRS Contract § 1.3(d), Record Excerpts ("R.E.") at 47.

The parties thereafter failed to agree on the amount properly credited to WMATA by virtue of the deleted work, thereby triggering the dispute resolution provision of the prime contract. *See id.* § 1.6, R.E. at 48-49. That clause designates WMATA's Board of Directors or its designated representative as the arbiter of contract disputes that cannot be resolved between the parties. *Id.* § 1.6(a). WMATA's Procurement Regulations, in turn,

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[1] On September 29, 1971, Comstock's rights and duties under the subcontract were assigned to a joint venture consisting of Comstock and Fischback & Moore, Inc. *General Railway Signal Co.*, ENG BCA No. 3970, ¶ 5, at 2 (Dec. 30, 1983), Record Excerpts ("R.E.") at 2. For simplicity's sake we will use "Comstock" to refer to both the original subcontractor and its assignee.

designate the General Manager of WMATA as the Board's representative for these purposes. WMATA Brief at 3. In addition, the Board by resolution has authorized the Board of Contract Appeals of the Army Corps of Engineers to hear such disputes initially and propose resolutions to the General Manager. *See id.*

The dispute before the Board of Contract Appeals centered on whether the $1.3 million figure allocated to trenching work by GRS in its bid to WMATA (and subsequently included in the unit price schedule of the prime contract) accurately reflected the reasonable costs of performing that work (were it in fact to be performed). WMATA took the position that the three line-item totals for trenching work did approximate costs and therefore provided an appropriate basis for calculating an equitable adjustment. GRS, in contrast, argued that the line item figures for trenching were merely arbitrary allocations and that the actual costs of the deleted work were much lower. To support this assertion, General Railway pointed to estimates obtained by WMATA itself fixing the cost of trenching at about half the line item total.

The Board of Contract Appeals nonetheless decided that the line item figures supplied in GRS's bid (and thereafter in the contract's unit price schedule) were presumptively reasonable and that GRS "ha[d] not carried the burden of proving that the bid prices [were] not a reasonable price for the deduction." *General Railway Signal Co.*, ENG BCA No. 3970, at 14 (Dec. 30, 1983) [hereinafter *Initial Board Decision*], R.E. at 1, 14. In addition to this amount, the Board concluded, an additional five percent should be added to reflect GRS's reasonable profit on the deleted work. It therefore recommended that as an equitable adjustment WMATA be credited a total of $1,403,325 for the eliminated trenching work. *Id.* at 15, R.E. at 15. The General Manager of WMATA approved and adopted this decision. Final Decision of General Manager, *General Railway Signal*

Co., WMATA Contract No. 1Z2011, ENG BCA No. 3970 (Apr. 7, 1984), R.E. at 20.

On review of the General Manager's decision, the District Court reversed. It rejected the Board of Contract Appeals' reliance on the bid price of $1.3 million. In the court's view, that figure was "simply an allocation required by WMATA for administrative purposes from successful bidders under lump-sum contracts." *General Railway Signal Co. v. WMATA*, Civ. No. 84-1717, slip op. at 4 (D.D.C. Nov. 14, 1984) [hereinafter *Initial District Court Opinion*], R.E. at 21, 24. The contract price did not necessarily reflect the true costs of the deleted trenching work. Accordingly, the court granted GRS's motion for summary judgment and remanded to the Board of Contract Appeals to determine "a reasonable cost estimate" for the work. *General Railway Signal Co. v. WMATA*, Civ. No. 84-1717 (order dated Nov. 14, 1984) (emphasis omitted), R.E. at 27. In addition, the court directed the Board to calculate interest on that amount "as provided by law." *Initial District Court Opinion* at 6, R.E. at 26. WMATA's immediate appeal of the court's decision was dismissed as premature. *General Railway Signal Co. v. WMATA*, No. 84-5900 (D.C. Cir. order dated Mar. 27, 1985).

On remand, the Board of Contract Appeals examined in detail various estimates of cost advanced by the parties. WMATA clung to the contention that the line item price in the unit price schedule accurately reflected cost. The Board rejected this argument, however; it decided that the most accurate basis for calculating reasonable cost was an estimate from WMATA's own expert, Bechtel Corp. Bechtel had supplied WMATA with an estimate during the period immediately after elimination of the trenching work in the protracted period when WMATA and GRS were attempting to negotiate a settlement on their own. *General Railway Co.*, ENG BCA 3970, at 10 (Mar. 29, 1985) [hereinafter *Board*

Decision on Remand], R.E. at 28, 36. The Board made an adjustment to Bechtel's estimate to take into account: (1) inclusion in the estimate of costs of trenching that were unnecessarily redundant; (2) inclusion in the estimate of costs attributable to a degree of soil compaction that exceeded what was appropriate or, presumably, contemplated by the parties; and (3) a mark up of 9.73%, proposed by both parties to reflect the contemplated profits of GRS and its subcontractor. *Id.* at 6, 10, R.E. at 33, 36. As a result of these calculations, the Board arrived at a credit due WMATA of $360,548. Under this determination, GRS was entitled to the amount of $975,952, which represented the difference between $1,336,500 (the amount withheld from GRS) and $360,548, the amount fixed by the Board as an equitable adjustment. *See General Railway Signal Co. v. WMATA*, Civ. No. 84-1717, slip op. at 3 n.2 (D.D.C. May 29, 1985) [hereinafter *District Court Opinion After Remand*], R.E. at 40, 42 n.2. The Board declined to reach the issue of the interest properly awarded on this amount, however, because "WMATA's liability for interest in connection with equitable adjustments is now pending . . . in several cases." *Board Decision on Remand* at 11, R.E. at 37.

The General Manager of WMATA refused to adopt the Board's recommendation. Instead, the General Manager reaffirmed her previous approval of the Board's first decision, which had adopted the line item figures for trenching as the proper equitable adjustment. Final Decision of General Manager, *General Railway Signal Co.*, WMATA Contract No. 1Z2011, ENG BCA No. 3970 (Apr. 5, 1985), R.E. at 39. GRS moved the District Court for judgment in its favor in accordance with the Board's recommendation.

The District Court upheld the decision of the Board as against the contrary view of the General Manager. *District Court Opinion After Remand* at 4, R.E. at 43.

The former, it concluded, was "in accord with the Court's [previously articulated] view of the applicable law and was based on undisputable facts." *Id.* Furthermore, the trial court concluded, "WMATA ha[d] presented no substantial reasons for rejecting the Board's decision." *Id.*

In addition to $975,952 in principal, the court awarded interest to General Railway on this amount. WMATA had waived sovereign immunity from interest, the court found, in its contract with GRS. *Id.* at 5, R.E. at 44.[2] The court further decided that the date from which prejudgment interest was properly calculated was April 17, 1984, the date on which WMATA's Board of Directors, through its General Manager, finally decided to withhold the full line item amount for trenching. *Id.* at 5-6, R.E. at 44-45. The District Court fixed the rate of interest at six percent, relying on the statutory limit prescribed in D.C. Code § 28-3302(a) (1984 Supp.) ("upon the loan . . . of money . . . in the absence of expressed contract.")[3] The court thus rejected General Railway's

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[2] The District Court specifically identified as the provision by which WMATA waived sovereign immunity "the 'equitable adjustment' language in the 'Changes' clause of the contract." *Id.* at 5, R.E. at 44. That clause was quoted in relevant part *supra* text at 4. The court reasoned that the legal concept of equitable adjustment is meant "to keep a contractor whole when the Government modifies a contract," and that "[p]rejudgment interest may be necessary to restore the contractor to the status quo prior to a change in the contract." *Id.*

[3] The statute more fully provides as follows:

> The rate of interest in the District [of Columbia] upon the loan or forbearance of money, goods, or things in action in the absence of expressed contract, is 6 percent per annum.

D.C. Code § 28-3302(a) (1984 Supp.). The contract between GRS and WMATA was executed and substantially performed in the District of Columbia; on this basis, its law was determined by the court to apply in this case. The parties have presented no reason why the law of another jurisdiction should be applied, nor do we discern any.

argument that WMATA had not only waived generally its immunity from awards of interest but had also waived the specific statutory limit in the Code. In the District Court's view, this argument "extend[ed] WMATA's waiver too far. The local provision clearly was intended to make six percent the applicable rate unless the parties fixed some other rate. No such rate was fixed here." *Id.* at 6, R.E. at 45. The District Court also awarded post-judgment interest to General Railway pursuant to D.C. Code § 28-3302(c).[4]

II

On appeal, WMATA argues that the District Court erroneously concluded that the line item figures for trenching did not reflect the reasonable cost of that work. WMATA also asserts that it should be immune from prejudgment interest. Finally, WMATA maintains that its liability for post-judgment interest is limited to four percent by virtue of D.C. Code § 28-3302(b).

General Railway, predictably, is satisfied with the District Court's award of principal. It contends that the court fell into error in its award of interest, however. First, it argues that prejudgment interest should have been calculated from the date on which WMATA's Contracting Officer issued his preliminary decision to withhold $1.3 million from GRS. Second, GRS maintains that the court erred in capping the rate of prejudgment inter-

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[4] Section 28-3302(c) provides in relevant part as follows:

> The rate of interest on judgments and decrees, where the judgment or decree is not against the District of Columbia or where the rate of interest is not fixed by contract, shall be 70 percent of the rate of interest set by the Secretary of the Treasury pursuant to [26 U.S.C. § 6621 (1982)] for underpayments and overpayments of tax to the Internal Revenue Service . . . .

D.C. Code § 28-3302(c).

est at six percent. We consider in turn the awards of principal and interest.[5]

A

The contract between General Railway and WMATA provides for "equitable adjustments" in instances where WMATA modifies the contract so as to increase or decrease the costs of work to be performed. The term "equitable adjustment" is a legal term of art; it signifies a principle designed "to keep a contractor whole when the Government modifies a contract." *Bruce Construction Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963). The proper measure of the adjustment is "the difference between what it would have cost to perform the work as originally required and what it cost to perform the work as changed." *Modern Foods, Inc.*, ASBCA 2090, 57-1 B.C.A. (CCH) ¶ 1229 (1975); *see also Bruce Construction*, 324 F.2d at 518-19. The primary dispute in this case has been and remains whether the $1.3 million line item figures contained in the unit price schedule of the prime contract establish the reasonable costs of the trenching work eliminated by WMATA. Like the District Court, we are convinced that they do not.

As an initial matter, we do not accept WMATA's contention that these figures, quoted to General Railway by the subcontractor and then employed by GRS in its bid to WMATA, should be treated as sacrosanct. WMATA Brief at 33-37. To be sure, when parties have struck a bargain and included a specific price for work to be performed, that price is presumed to represent the rea-

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[5] In reviewing disputes that arise under the "Disputes" clause of WMATA's subway contracts, this court has applied the contractually prescribed standard of review "which allows a court to reverse determinations of the General Manager when they are arbitrary, capricious, unsupported by substantial evidence, or incorrect as a matter of law." *George Hyman Construction Co. v. WMATA*, No. 85-6180, slip op. at 7-8 (D.C. Cir. Apr. 21, 1987). We shall do the same.

sonable costs of the work. *See, e.g., Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971); *see also Bruce Construction*, 324 F.2d at 518-19; *S.N. Nielsen Co. v. United States*, 141 Ct. Cl. 793, 797 (1958); *B-E-C-K-Christensen Raber-Kief & Associates*, ASBCA 16467, 73-1 B.C.A. (CCH) ¶ 9884 (1973). At the same time, courts have consistently rejected efforts to equate bid prices for various portions of work with contract prices. The reason is judicial recognition that contractors frequently submit unbalanced bids, understating the true costs of one portion of the contract with an offsetting overstatement on a different portion. For the reasons that follow, we agree with the District Court that, in this case, the $1.3 million line item totals were not contractually agreed upon prices at which the work in question was to be performed; those line item totals therefore do not presumptively reflect the reasonable costs of that work.

For one thing, the bid prices for the three phases of trenching were supplied by the subcontractor (Comstock) to General Railway only after the GRS-Comstock subcontract had been executed on a lump-sum basis. *See Initial Board Decision* ¶¶ 7-9, at 3, R.E. at 3; *id.* at 16 (Sheridan, ALJ, dissenting), R.E. at 16. General Railway requested the breakdown of line item totals not as a precondition to agreement with the subcontractor, but rather, after the agreement had been reached, for General Railway's use in the unit price schedule required by WMATA.[6] Even more importantly, the prime contract with WMATA was likewise a lump-sum contract. *See Board Decision on Remand* ¶¶ 8-9, at 2-3, R.E. at 30. Further evidence appears in the fact that progress payments under the prime contract bore no relationship to

[6] In fact, the lump-sum GRS-Comstock subcontract did not expressly include the bid prices for trenching. They were implicitly incorporated by virtue of a clause incorporating WMATA's Invitation For Bid, which included the unit price schedule on which line items were listed. *See Board Decision on Remand*, at 3, R.E. at 30.

the unit price schedule of which the line items were a part. *See Initial District Court Opinion* at 4, R.E. at 24. Finally, the line items were apparently based on a flat rate of $5 per linear foot that could not be supported in the hearings before the Board. *Id.* The want of support is explained in part by the fact that the $5 flat rate was based merely on an oral quotation supplied to Comstock by excavators opining, without even knowing the type of material to be excavated, that the appropriate price range for the work was $2 to $5 per foot. Comstock then used the uppermost boundary of this range in its own bid to GRS, assuming that it was a "safe figure." *Board Decision on Remand* ¶ 17, at 5, R.E. at 32. The rather casual way in which the price range was provided, and Comstock's apparently offhand use of the high end in providing GRS with a further breakdown of the lump-sum subcontract strongly suggest that the line item totals derived from the flat rate were not contractually agreed upon prices. *Cf. Nager*, 442 F.2d at 947-48.

Even if the line items were deemed contract prices, GRS submitted ample evidence to defeat the presumption of reasonableness typically accorded contract prices. The line item figures are grossly disproportionate to all three of WMATA's own estimates of actual cost, which ranged from $566,000 to about $650,000. *See Initial District Court Opinion* at 4, R.E. at 24. Even assuming *arguendo* that the flat rate of $5 per foot reasonably reflected the direct costs of trenching, the $1.3 million total line item figures would still stand condemned as unreasonable because they included an enormous 161.5% mark-up to cover profits and indirect costs. *Board Decision on Remand* ¶ 21, at 5-6, R.E. at 32-33. This top-heavy add-on is wholly disproportionate to the relatively modest indirect costs and the 9.73% profit figure employed in an estimate furnished to WMATA of the costs of the work that included these elements. *See Board Decision on Remand* ¶¶ 22, 27, at 6-7, R.E. at 33-34. Thus, the District Court was justified in remanding the case to the Board

for a determination of reasonable costs, since the Board's initial reliance on the line items was misplaced.

For essentially the same reasons, we can discern no basis for setting aside the Board's determination on remand that $360,548 was an accurate approximation of the reasonable cost of the originally contemplated trenching work. This estimate was based on the Bechtel estimate that, as we mentioned above, WMATA itself obtained at the time the parties were attempting to negotiate a settlement. *See supra* text at 6. The Board's most significant adjustment to this estimate was to lower the amount of redundant trenching upon which the estimate was based. *See Board Decision on Remand* at 10, R.E. at 36. This reduction finds ample support in the record. The amount of redundant trenching assumed appropriate by the Board was the average of the amounts employed in the three WMATA estimates. *See id.* at 9-10, R.E. at 35-36. In deciding to utilize an average of the three estimates, the Board took into account the physical characteristics of the job site that would necessarily limit the extent of redundant trenching below that assumed in the Bechtel estimate. *Id.* at 9, R.E. at 35.

In opposing the Board's approach, WMATA primarily renews its argument that the line item figures reflect reasonable costs. At the same time, it offers no substantial reasons why the Board's estimate is unreasonable. *See* Final Decision of General Manager, R.E. at 39.

We therefore affirm the District Court's judgment insofar as it fixed the principal due GRS at $975,952. We next consider the court's award of interest. —

B

Our review of the District Court's award of prejudgment interest requires us initially to consider whether WMATA enjoys sovereign immunity from liability for interest. If it does not, we must then determine the date

from which interest was properly calculated and the applicable rate.

1

WMATA is an instrumentality of each of the signatories—Maryland, Virginia, and the District of Columbia—to the Compact that created the Authority. *See* D.C. Code § 1-2431. As such, "WMATA's sovereign immunity exists because the signatories have successfully conferred their respective sovereign immunities upon it." *Morris v. WMATA*, 781 F.2d 218, 219 (D.C. Cir. 1986). It is well-settled that a sovereign is immune from liability for interest unless it has waived its immunity by statute or contract. *See, e.g., United States v. North Carolina*, 136 U.S. 211 (1890). The Supreme Court has only recently reaffirmed this general proposition. *See Library of Congress v. Shaw*, 106 S. St. 2957 (1986).

In creating WMATA, the signatories (with Congress' authorization, *see Morris*, 781 F.2d at 219) expressly provided that the Authority could be held liable to some extent for damages arising out of contracts. Section 80 of the Compact provides in relevant part:

> The Authority shall be liable for its contracts and for its torts . . . committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory . . . but shall not be liable for any torts occurring in the performance of a governmental function . . . .

D.C. Code Ann. § 1-2431 ¶ 80 (1981). Applying the law of the District of Columbia, we conclude that under the circumstances of this case WMATA has waived whatever immunity from prejudgment interest it otherwise enjoys.

We base our conclusion on the contract between WMATA and GRS. The "Changes" clause of that contract, as we have seen, authorizes "equitable adjustments" in cases like this. This term imports into the contract a doctrine mandating a make-whole remedy that

will restore a contractor to the contractor's pre-change circumstances. Courts have long recognized that restoration of a party to the *status quo ante* typically requires compensation for prejudgment interest, since it is an actual element of the costs incurred by virtue of the other party's conduct. *See Maryland Port Administration v. C.J. Langenfelder & Son, Inc.*, 438 A.2d 1374 (Md. Ct. Spec. App. 1982); *see also Bebchick v. Washington Metropolitan Area Transit Commission*, 645 F.2d 1086, 1093 (D.C. Cir. 1981).[7] Thus, in agreeing wholly to compensate GRS for any costs sustained as a result of modifications in the work it wanted performed, WMATA waived its immunity from prejudgment interest, which in this case constituted a significant portion of those costs. *See supra* note 7.

Two further considerations buttress our conclusion. First, the District of Columbia itself, from whom WMATA's immunity in this case derives, has on at least one occasion been held liable for interest as an element of damages under section 15-109 of the D.C. Code.[8] In *Pierce Associates, Inc. v. District of Columbia Department of General Services*, C.A. No. 15631-79 (D.C.

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[7] That prejudgment interest may constitute a significant element of damages is evident on the facts of this case. Even assuming for a moment that the District Court correctly held that interest should run from April 17, 1984, the date of WMATA's administrative decision on the equitable adjustment, and be limited to six percent, GRS would be entitled to over $65,000. *See* Reply Brief of GRS at 52 (chart comparing amounts of interest due under various theories of parties).

[8] Section 15-109 provides in relevant part as follows:

> In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury, or the court . . . from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff.

D.C. Code Ann. § 15-109.

Super. Ct. Jan. 7, 1982), the court ordered the District to pay interest for its delay in making payment pursuant to the terms of a settlement agreement between it and a contractor. In an analogous context, the District recently enacted a statute permitting awards of interest against it for failures timely to pay for goods and services. *See* D.C. Code Ann. § 1-1172 (1986 Cum. Supp.). Second, in a case involving the same parties now before us, this court has upheld the decision of a trial court awarding interest against WMATA for unreasonable delay in making an equitable adjustment under a contract. *See General Railway Signal Co. v. WMATA*, 664 F.2d 296 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 915 (1981), *aff'g* 527 F. Supp. 359, 361 (D.D.C. 1980) (action for breach of contract arising under D.C. Code Ann. § 15-109).

Accordingly, we hold that the District Court correctly determined that WMATA has no sovereign immunity from an award of interest in this case.

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Employing similar reasoning, we are constrained to conclude, however, that the District Court erred in its selection of the date from which prejudgment interest should be calculated and in limiting the rate of interest to six percent in reliance on D.C. Code § 28-3302.

Section 28-3302 provides that "[t]he rate of interest in the [District of Columbia] upon the loan or forbearance of money, goods, or things in action *in the absence of express contract*, is 6 percent per annum." D.C. Code Ann. § 28-3302(a) (1986 Cum. Supp.) (emphasis added). As we discussed above, the equitable adjustment provision of the contract between GRS and WMATA is just such an express term. Enforcement of that provision requires the court to make the contractor whole, which can be achieved only by awarding prejudgment interest at the market rate. Similarly, restoration of

GRS to the *status quo ante* demands that prejudgment interest run from the date on which the amount due GRS was first withheld, January 17, 1979, and not from the date of the General Manager's approval in April 1984 of the 1979 decision to withhold the money.

Our determination is buttressed by section 15-109 of the D.C. Code, which permits courts "to include[] interest as an element in the damages awarded, if necessary to fully compensate the plaintiff." D.C. Code Ann. § 15-109. Although this statute expressly governs only "action[s] to recover damages for breach of contract," *id.*, the District of Columbia courts have applied it in a suit for accounting which "although not framed as a breach of contract action, was based on a contractual relationship between the parties." *House of Wines v. Sumter*, 510 A.2d 492, 499 (D.C. App. 1986). And this court has likewise considered section 15-109 to govern a contractor's claim for unreasonable delay by WMATA in making a payment pursuant to the equitable adjustment provision of a contract. *See General Railway*, 664 F.2d 296. In the latter case, we found that "the disputed contract included an implied condition requiring WMATA to make equitable adjustments of claims under the contract within a reasonable time." *Id.* at 296. The reasoning of *General Railway* is, we believe, equally applicable in the case at hand. The equitable adjustment language of the contract imposed a contractual duty on WMATA to act fairly when it reduced payments because of deleted work—a duty it allegedly breached in 1979 when it withheld an excessive amount of progress payments. Compensating GRS for costs incurred by virtue of the breach of duty requires interest to begin on the date of this breach.

Thus, although GRS's action in this case is not, strictly speaking, an action for breach of contract—rather it is an action to enforce the contract as modified—we believe case law supports its applicability in instances such as

this. It is clear that by providing for prejudgment interest to the extent necessary fully to compensate the plaintiff, section 15-109 dictates calculation of interest for the period and at a rate that accurately reflects the costs GRS incurred by virtue of WMATA's wrongful withholding. The appropriate period must be coextensive with the actual period of withholding; the appropriate rate is that which prevailed in the market during the relevant period. *See Pierce Associates, Inc. v. District of Columbia*, Civ. No. 6893-84 (D.C. Super. Ct. Jan. 27, 1986).

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Although WMATA includes as one of the issues in its appeal the District Court's award of post-judgment interest, it advances no substantial reasons to justify setting aside the court's determination. *See* WMATA Brief at 60.[9] We therefore affirm the award of post-judgment interest according to the formula set forth in section 28-3302(c) of the D.C. Code (1986 Cum. Supp.), providing 70 percent of the rate fixed by the Secretary of Treasury for overpayments and underpayments of federal taxes, *see* 26 U.S.C. § 6621 (1982).

III

We therefore remand this case to the District Court to calculate prejudgment interest at the appropriate market rate from January 17, 1979. We affirm the District Court in all other respects.

Judgment accordingly.

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[9] WMATA argues, in a solitary clause of its lengthy brief, that D.C. Code § 28-3302(b) applies in this case and requires that post-judgment interest be limited to 4 percent. That provision, however, governs only "judgments . . . against the District of Columbia." *Id.* WMATA has advanced no reasons in support of treating WMATA, a creature of interstate compact, designed to be an instrumentality of three jurisdictions, as the District of Columbia. *See Morris*, 781 F.2d at 218. In the absence of any such reasons, we reject this argument, which WMATA itself does not appear to entertain seriously.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1717

GENERAL RAILWAY SIGNAL CO., PLAINTIFF,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, DEFENDANT.

[Filed May 29, 1985]

MEMORANDUM

This contract dispute is again before the Court on plaintiff's motion for entry of judgment following completion of the Court's remand to the Army Corps of Engineers Board of Contract Appeals. The Court has considered the briefs of the parties and the entire record herein.

The dispute now is over the proper amount to be deducted as an equitable adjustment for the elimination of a specific part of the work that General Railway Signal Co. (GRS) contracted to perform on defendant WMATA's subway system. On January 17, 1979, WMATA's contract officer set the deduction at $1,336,500, and that amount was withheld from progress payments to GRS. Pursuant to the disputes clause of the contract, the parties submitted the issue to the Army Corps of Engineers Board of Contract Appeals (the Board). The Board fixed the credit due WMATA at $1,403,325, and WMATA's general man-

ager adopted that amount as his [*sic*] final decision on April 17, 1984.

On consideration of plaintiff's complaint to review the general manager's decision adopting the Board's recommendation, the Court on November 4, 1984 held that the Board's finding was not supported by substantial evidence and was erroneous as a matter of law. The Court then remanded the case to the Board "with direction to determine a reasonable *cost* estimate within 90 days, plus interest as provided by law." On January 30, 1985, the Court denied WMATA's motion to stay proceedings pending appeal and ordered the WMATA general manager to issue a decision within seven days of the Board's determination of the remand.

On March 29, 1985, the Board determined the amount of the credit at $360,548, although it declined to rule on the amount of interest to be added to that base amount.[1] In determining the reasonable cost of the deleted work, the Board added standard percentage markups for indirect costs and profit to GRS and its subcontractor.

On April 5, 1985, the WMATA general manager rejected the March 29 Board decision and stated that his [*sic*] prior decision adopting the Board's first decision "is correct and the same . . . is hereby restated and reaffirmed." The general manager made no findings of fact beyond readopting the Board's initial decision.

In its motion for entry of judgment, GRS asks the Court to reject the general manager's final decision as not based on substantial evidence and to adopt the March 29,

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[1] The Board indicated in its decision that "[t]he issue of the extent of WMATA's liability for interest in connection with equitable adjustments is now pending before various judges of the United States District Court for the District of Columbia in several cases. Therefore, the Board's determination of what interest is 'provided by law' must await further instructions from the Court on the criteria to be applied." Board decision at 11.

1985 Board decision with the addition of interest from the date in 1979 when the payments were withheld from GRS.[2] GRS thus seeks the difference between the amount withheld in 1979 and the amount that should have been withheld—that is, $1,336,500 minus $360,548, or $975,952—plus interest of $752,713.01. The interest figure is derived from the rates established by 26 U.S.C. § 6621, which are based on the average prime rate as determined by the Secretary of the Treasury.

In its opposition, WMATA contends the general manager's decision is entitled to affirmance because it was based on substantial evidence in the record.[3] It then proceeds to reargue at length the same issues decided by the Court against WMATA in the Court's November 14, 1984 Memorandum. Since the Court already has decided that there was not substantial evidence supporting WMATA's view that a correct equitable adjustment was $1,403,325, and since the general manager has done nothing more than reject out of hand the Board's remand decision and rely

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[2] The WMATA contracting officer originally issued a final decision that $1,336,500 was the proper equitable adjustment in May 1977. After GRS noticed an appeal from this decision, the contracting officer made a superseding decision setting the adjustment provisionally at $400,000 pending further negotiations between the parties. The $400,000 was withheld as of this new decision in February 1978. Negotiations during the remainder of 1978 failed to settle the issue, and on January 17, 1979, the contracting officer finally decided that WMATA was entitled to an additional $936,500. That brought the equitable adjustment back to the original figure of $1,336,500.

[3] WMATA is correct, of course, that the decision now before the Court for review is that of the general manager, not of the Board on remand. The Court in the first instance, and at the agreement of the parties, remanded the decision directly to the Board, rather than to the general manager, in recognition of the practicalities of the situation—the Board was the designated fact-finder for the general manager and the general manager had wholly adopted the Board's initial, erroneous decision as his [*sic*] own.

entirely on the old decision, it is apparent that the new general manager's decision must be rejected.[4]

WMATA has presented no substantial reasons for rejecting the Board's decision on remand, which is in accord with the Court's view of the applicable law and was based on undisputable facts. Accordingly the Board's decision on remand is adopted as establishing the appropriate equitable adjustment for the cost of the deleted work, including profit and overhead. Thus GRS is entitled to $975,952 as reimbursement for the amount WMATA wrongfully withheld as of January 17, 1979 in excess of the proper equitable adjustment of $360,548.

The only remaining issue is GRS's entitlement to prejudgment interest on the excess withheld. WMATA argues that it is not obliged to pay any prejudgment interest and that if it is, the rate is limited to that set by D.C. Code § 28-3302. The parties have not informed the Court of the jurisdiction whose law governs this contract but seem to assume that the law of the District of Columbia controls. Since the District of Columbia is apparently where the contract was executed and was substantially performed, the Court determines its law to be applicable.

Prejudgment interest against a governmental entity like WMATA is allowable only when there is a statutory or contractual waiver of sovereign immunity for such interest. Waiver occurred here by virtue of the "equitable adjust-

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[4] WMATA makes one new argument that is wholly frivolous and also must be rejected. It contends that even if $360,548 is a reasonable estimate of the cost of the deleted work, the equitable price reduction must nonetheless be $1,403,325 to avoid paying GRS overhead and profit on the deleted work. The legal principle that GRS should not receive a profit and overhead windfall on the deleted work is not in doubt. What WMATA ignores is that the Board expressly included an overhead and profit calculation in reaching the $360,548 figure. *See* Board Opinion of March 29, 1985, at 10-11.

ment" language in the "Changes" clause of the contract.[5] Equitable adjustment is a term of art designed "to keep a contractor whole when the Government modifies a contract." *Bruce Construction Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963). Prejudgment interest may be necessary to restore the contractor to the status quo prior to a change in the contract. Such is the case here. Moreover, the equitable adjustment provided for by the "Changes" clause does not exclude profits on a contractor's increased costs. *Compare Excavation Construction, Inc. v. WMATA*, Civil Action No. 83-1125, slip op. at 4-5 (D.D.C. Apr. 19, 1985).

GRS seeks interest from the date of the contracting officer's final decision to withhold $1,336,500, on January 17, 1979. However, because this was subject to administrative appeal, this did not become WMATA's final decision under Article 11, the disputes clause of the contract, until WMATA's board of directors acted through its designated representative, the WMATA general manager. That decision was rendered on April 17, 1984. There is no indication that this decision was unreasonably delayed so as to entitle GRS to interest from an earlier date. *See General Railway Signal Co. v. WMATA*, 664 F.2d 296 (D.C. Cir. 1980) (per curiam). The Court concludes that prejudgment interest on the $975,952 is due to GRS as of April 17, 1984.

GRS argues that in waiving immunity as to interest in its contract, WMATA also waived the statutory limit of six percent in the District of Columbia "upon the loan . . . of money . . . in the absence of expressed contract." D.C. Code § 28-3302(a) (1984 Supp.). The Court is of

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[5] Article 2, *Changes*, of the contract's general provisions provides in part that "[i]f any such change [ordered by the contracting officer] causes an increase or decrease in the cost of . . . any part of the work under this contract . . . an equitable adjustment shall be made in the contract price . . . and the contract shall be modified in writing accordingly."

the view that this extends WMATA's waiver too far. The local code provision clearly was intended to make six percent the applicable rate unless the parties fixed some other rate. No such rate was fixed here. Therefore GRS is entitled to six percent interest on $975,952 from April 17, 1984 until the date of this Order. The Court calculates this interest amount at $65,455.63. Post-judgment interest will be fixed by D.C. Code § 28-3302(c) (1984 Supp.) (providing a rate 70 percent of that fixed by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621).

An appropriate Order is attached herewith.

/s/ Gerhard A. Gesell
United States District Judge

May 29, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1717

GENERAL RAILWAY SIGNAL CO., PLAINTIFF,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, DEFENDANT.

ORDER

Upon consideration of plaintiff's motion for entry of final judgment, defendant's opposition thereto, and the entire record herein, for reasons stated in an accompanying Memorandum, it is hereby

ORDERED that judgment is entered for plaintiff in the amount of $975,952 in principal and $65,455.63 in prejudgment interest, with postjudgment interest to be fixed at the rate set by D.C. Code § 28-3302(c) (1984 Supp.).

/s/ Gerhard A. Gesell
United States District Judge

May 29, 1985

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1717

GENERAL RAILWAY SIGNAL CO., PLAINTIFF,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
DEFENDANT.

[Filed Nov. 14, 1984]

MEMORANDUM

General Railway Signal Co. ("GRS") and Washington Metropolitan Area Transit Authority ("WMATA") entered into a lump-sum contract covering three phases of the Metro subway project. This is a dispute over the proper amount to be deducted as an equitable adjustment for a change of work eliminating a specific portion of the work covered by the contract. By cross-motions for summary judgment, which have been fully argued, the Court is asked to review the final decision of WMATA's general manager adopting the majority opinion and rejecting the minority decision of the Army Corps of Engineers Board of Contract Appeals dated December 30, 1983, which fixed the credit due WMATA at $1,403,325.

The standard for review in this situation is not in dispute. It is derived from the Wunderlich Act, 41

U.S.C. § 321 et seq. The Board's decision is final and conclusive unless (1) it is erroneous as a matter of law or (2) it is based on findings of fact which are fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence on the record as a whole. GRS contends that the Board's decision is not supported by substantial evidence and is based on a misapplication of the appropriate legal standard.

A detailed review of the facts established in the extensive administrative record on file with the Court is unnecessary to resolve this dispute. The basic background facts are not essentially contested and are fully covered in the Board's comprehensive findings of fact. It is necessary only to focus here on the nature of the work change and the facts relied on by the Board in reaching the disputed equitable adjustment.

GRS's contract required, among other things, the installation of certain wayside equipment for the WMATA automatic train control system and the cables connecting this equipment to the train control room. As originally envisioned under the lump sum contract awarded to GRS, the cables were to be installed by the direct burial method along the right-of-way where the WMATA tracks were at-grade. Direct burial of cable involved excavation of the trench, placement of a stand cushion before running the electrical cable, backfilling and compacting, followed by removal of any excess backfill displaced by the sand and cables. Before any of this work was performed WMATA decided it would provide duct banks for the cable and eliminate the trench work entirely. A price for the new method was negotiated and fixed by agreement. The amount is not in controversy. The work has been performed by the same subcontractor to which GRS had subcontracted the trench work as well as many other electrical aspects of the contract.

This dispute therefore concerns only the amount the original contract price should be reduced by reason of the deleted trench work. This work was part of a large subcontract awarded by GRS which covered almost one-half of GRS's entire contract undertaken for a fixed price lump sum of $42,074,675.30. The subcontractor bid and had also been given a lump sum for its work. When GRS was preparing a unit price schedule as required by WMATA's bid invitation, it asked the subcontractor for a line-item breakdown of its costs. The subcontractor provided such a breakdown, but it was not incorporated into the subcontract.[1] The trenching items for the three phases of the WMATA project totaled $1,336,500. GRS used the same trenching line-item figures in its unit price schedule.

The Board of Contract Appeals, by a 2-1 decision, adopted this $1,336,500 figure as conclusive proof of the reasonable cost to GRS of performing the deleted work. It added $66,825 to cover GRS's reasonable profit on the deleted work, resulting in the $1,403,325 credit to WMATA.

GRS sharply challenges the majority Board's use of these line items as a measure of the true cost of the deleted work. It contends that the actual cost of performing the work had it been performed should be used rather than arbitrary unit price figures. WMATA's own estimates of the actual cost were $652,742, $646,985 and $566,000. GRS had lower estimates.

It is clear that the subcontractor was not bound to perform the work or GRS to pay for the work at the line-item figures. These figures were simply an allocation

[1] By the time this dispute came before the Board many years after the contract and subcontract were entered into in 1971, the subcontractor's work papers used in arriving at the breakdown figures had been destroyed in regular course, and the amount that would have been incurred for performing the deleted work was not readily ascertainable.

required by WMATA for administrative purposes from successful bidders under lump-sum contracts. In this instance, the unit price schedule was not used even to schedule progress payments. The figures provided were based on $5 per linear foot, an amount that could not be supported at the hearing and that was obviously merely a loose estimate. The use of any line-item figure of this kind has little value in establishing cost for purposes of equitable adjustment for a reduction-of-work situation. The undisputed wide gap between the estimated actual cost for performing the work and the dubious inference the majority drew from the line items as to actual or reasonable cost of performance fully demonstrates the unreliability of the unit price schedule on which the Board rested its conclusions as to cost. The majority departed from any conclusion that could have been made on the record by a reasonable person and gave a windfall to WMATA.

There were no fixed agreed prices for portions of the work covered by the lump-sum contract. Absent such fixed agreed prices, the proper measure of an equitable adjustment in a reduction-of-work case like this is the reasonable cost of performing the work. *See, e.g., Gregory and Reilly Associates, Inc.*, 65-2 B.C.A. ¶ 4918 at 23,253 (1965); *Bruce Construction Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963). The presumption is that reasonable cost is determined by a contractor's actual costs, *see Nager Electric Co. v. United States*, 442 F.2d 936, 951 (Ct. Cl. 1971), and therefore bid pricing calculations, while useful in some instances in showing a contractor's own pre-dispute estimate of actual cost, cannot be relied on when they vary widely, as they do here, from the only estimates of actual cost in evidence.[2] That actual cost is the presumptive basis for measurement is

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[2] The courts accordingly have rejected reliance on bid prices when they do not reflect actual costs. *E.g., S.N. Nielsen Co. v. United States*, 141 Ct. Cl. 793 (1958).

not in dispute. The Board erred in concluding that the subcontract established a fixed price to GRS for the deleted line items. On the contrary, it is clear that the subcontract, just as GRS's contract with WMATA, was a lump-sum contract. The line-item allocation submitted by the subcontractor to GRS was presented after the subcontract was made and the subcontract was not amended to reflect it. Accordingly, there was no contract binding GRS to pay a set amount for the deleted work.

Therefore, the Court concludes that the Board majority's finding of cost is not supported by substantial evidence. Moreover, the majority erred as a matter of law in placing the burden on plaintiff to prove the unreasonableness of the line items as a measure of cost—something they were never intended to be in the first place. *See Victory Construction Co. v. United States*, 510 F.2d 1379, 1385 (Ct. Cl. 1975).

The decision of the Board is reversed and the case is remanded with direction to determine a reasonable *cost* estimate within 90 days, plus interest as provided by law.

/s/ Gerhard A. Gesell
United States District Judge

November 14, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1717

GENERAL RAILWAY SIGNAL CO., PLAINTIFF,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, DEFENDANT.

ORDER

Upon consideration of the parties' cross-motions for summary judgment, the arguments of counsel, and the entire record herein, for reasons stated in the accompanying Memorandum, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, and it is further

ORDERED that defendant's motion for summary judgment is denied, and it is further

ORDERED that the case is remanded to the Army Corps of Engineers Board of Contract Appeals to determine a reasonable *cost* estimate within 90 days, plus interest as provided by law.

/s/ Gerhard A. Gesell
United States District Judge

November 14, 1984

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5753

GENERAL RAILWAY SIGNAL CO.

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, APPELLANT

No. 85-5768

GENERAL RAILWAY SIGNAL CO., APPELLANT

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

[Filed May 12, 1989]

Before ROBINSON and STARR, *Circuit Judges* and McGOWAN,* *Senior Circuit Judge.*

JUDGMENT

This cause came on for consideration upon the record on appeal from the United States District Court for the

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* *Senior Circuit Judge* McGowan did not participate in this judgment.

District of Columbia, and was briefed and argued by counsel.

Upon consideration thereof, it is

ORDERED and ADJUDGED by the Court that the judgment of the District Court appealed from in this cause be and hereby is affirmed. It is

FURTHER ORDERED by the Court, *sua sponte*, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15, August 1, 1987.

PER CURIAM
FOR THE COURT

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5753

GENERAL RAILWAY SIGNAL CO.

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, APPELLANT

and consolidated case No. 85-5768

[Filed Sept. 11, 1989]

Before: Edwards and Ruth B. Ginsburg, Circuit Judges, and Robinson, Senior Circuit Judge

ORDER

Upon consideration of the motion of the Washington Metropolitan Area Transit Authority (WMATA) to defer consideration of the petition for rehearing it is

ORDERED, by the Court, that the motion is denied and, upon consideration of the petition for rehearing of WMATA, it is

FURTHER ORDERED, by the Court, that the petition is denied.

PER CURIAM
FOR THE COURT
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Edwards and Ruth B. Ginsburg were drawn by lot to become members of the panel.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5753

GENERAL RAILWAY SIGNAL CO.

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, APPELLANT

and consolidated case No. 85-5768

[Filed Sept. 11, 1989]

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges, and Robinson, Senior Circuit Judge

ORDER

Upon consideration of the Motion of the Washington Metropolitan Area Transit Authority (WMATA) to defer consideration of the suggestion for rehearing *en banc* it is

ORDERED, by the Court, *en banc*, that the motion is denied and, the suggestion for rehearing *en banc* of WMATA having been circulated to the full Court with no member requesting the taking of a vote, it is

FURTHER ORDERED, by the Court *en banc*, that the suggestion is denied.

PER CURIAM
FOR THE COURT
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5753

GENERAL RAILWAY SIGNAL CO.

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, APPELLANT

and consolidated case No. 85-5768

[Filed Sept. 26, 1989]

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges, and Robinson, Senior Circuit Judge

ORDER

It is ordered, by the Court *en banc*, *sua sponte*, that the panel and *en banc* orders filed on September 11, 1989 are amended by deleting the following from lines one and two of the first paragraphs:

the Washington Metropolitan Area Transit Authority (WMATA)

and substituting therefor:

General Railway Signal Co.

PER CURIAM
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk